

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11

Intrepid, U.S.A., Inc.,
and Jointly Administered Cases,
Debtors.

Case # 04-40416-NCD
Case # 04-40462-NCD
Case # 04-40418-NCD
Cases 04-41924 through 04-41988-NCD

UNITED STATES TRUSTEE'S OBJECTION TO THE APPLICATION
OF MANCHESTER COMPANIES, INC. FOR ALLOWANCE OF FEES

COMES NOW the United States Trustee through his undersigned attorney, Michael R. Fadlovich, and does hereby object to the Application for allowance of fees (Fee Application) by Manchester Companies, Inc. (MCI or Applicant) as "advisors" to the debtors in the above entitled cases. In support of his objection, the United States Trustee states as follows:

1. A hearing has been scheduled in this matter on October 6, 2004, at 2:00 p.m. before the Honorable Nancy C. Dreher, Courtroom No. 7 West, U.S. Bankruptcy Court, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.
2. This objection arises under 11 U.S.C. § 330; FED. R. BANKR. P. 2002(a) & (c), FED. R. BANKR. P. 2016 & Local Rule 2016-1. The United States Trustee has standing to object pursuant to 11 U.S.C. § 307 and 28 U.S.C. § 586(3)(A).
3. The above captioned cases were commenced under Chapter 11 on January 29, 2004, and April 12, 2004. The cases are now pending before this court.
4. The Fee Application now before the court was filed on or about September 13, 2004. It seeks allowance of fees totaling \$93,700.00. The services rendered cover the time period commencing

January 29, 2004, through March 10, 2004, a period of approximately 40 days.

5. MCI's employment was approved retroactively to act as an "advisor" for the debtors by order entered April 1, 2004, after it, *inter alia*, waived its \$22,000.00 pre petition claim.

OBJECTIONS

6. The U.S. Trustee objects to the application because the services rendered do not appear to have provided commensurate value to the bankruptcy estates. Rather, the services, all rendered in the first 40 days of the first three cases, appear to have been for the benefit of the debtor's sole shareholder, Todd Garamella. As such, the services did not provide value to the bankruptcy estates and should not be allowed. The time entries during the first few weeks of services provided by MCI show numerous conferences between MCI, Mr. Garamella and Mr. Garamella's personal attorney, John McDonald, without the presence of debtors' counsel, Fredrikson & Byron. See time entries for Mark Sheffert (lead member of MCI) dated 1/29/04, 1/30/04, 2/4/04, 2/20/04 and 3/5/04. Services rendered to shareholders and not the Debtor in Possession are not compensable by the estate.

7. The U.S. Trustee also objects because the descriptions in the Application of the services rendered are vague, wholly lacking in specificity, and fail to provide sufficient detail to meet the Applicant's burden of proof that the services had value. For example, there are numerous time entries such as "Phone Conference with", "Various phone calls w/", etc., yet there is no explanation of the nature of such calls. (See, *e.g.*, Mark Sheffert, 2/1/04, 2/5/04, 2/9/04, 2/14/04, 2/16/04, 2/23/04, 3/5/04 and 3/7/04 3/8/04, and 3/9/04. Although members of MCI may have made or participated in such calls, without an explanation there is no way to establish whether they were reasonable, necessary and provided value to the estate.

8. The Application contains a number of time entries which are both duplicative and appear to

have provided no value to the estate. For example, Jim Gieser and Kathy Vessells both attended bankruptcy court hearing on 3/2/04 and 3/3/04. Also, on those two days, Mark Sheffert charges for “Various phone conversations (at or in preparation of) Motion Hearing” for 4.5 hours on 3/2/04 and 5.0 hours on 3/3/04. The participation in the hearing by all three individuals was at best duplicative, was simply not necessary and failed to provide value to the bankruptcy estates.

9. The Application fails to accurately set forth a value for the services rendered because it bills the estates in one half hour increments. Such billing practices have the effect of over charging the estates since the time spent on various services is overstated. Given the nature of the billings in half hour increments, the Application appears to overstate the value of services and should be reduced by at least twenty five percent (25%).

WHEREFORE, the United States Trustee requests that the Bankruptcy Court deny the Fee Application of Manchester Companies, Inc. as advisors to the debtors in these cases. The U.S. Trustee requests such further relief as may be just and equitable.

Dated: September 29, 2004

HABBO G. FOKKENA
United States Trustee
Region 12

s/Michael R. Fadlovich
Michael R. Fadlovich, Atty # 158410
Trial Attorney

U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415
TELE: (612) 664-5500
FAX: (612) 664-5516

VERIFICATION

I, Michael R. Fadlovich, an attorney for the United States Trustee, do hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: September 29, 2004

s/Michael R. Fadlovich

Michael R. Fadlovich

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11

Intrepid, U.S.A., Inc.,
and Jointly Administered Cases,
Debtors.

Case # 04-40416-NCD
Case # 04-40462-NCD
Case # 04-40418-NCD
Cases 04-41924 through 04-41988-NCD

MEMORANDUM OF LAW IN SUPPORT OF
UNITED STATES TRUSTEE'S OBJECTION TO THE APPLICATION
OF MANCHESTER COMPANIES, INC. FOR ALLOWANCE OF COMPENSATION

The United States Trustee submits this Memorandum of Law in support of his objection to the Application for compensation by Manchester Companies, Inc., (MCI or Applicant) as advisors to the debtors in the above entitled cases.

For professions hired under 11 U.S.C. §§ 327 and 1103, compensation and reimbursement of expenses is awarded through Section 330(a), which provides in part:

(a)(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103—

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by an paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, ... or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3)(A) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant factors, including —

(A) the time spent on such services;

- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed; and
- (E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4) (A) Except as provided in subparagraph (b), the court shall not allow compensation for —

- (i) unnecessary duplication of services; or
- (ii) services that were not —

- (I) reasonable likely to benefit the debtor's estate; or
- (II) necessary to the administration of the estate.

11 U.S.C. § 330(a); *see also In re Reed*, 890 F.2d 104 (8th Cir 1989).

Section 330(a) was overhauled by the 1994 Amendments to the Bankruptcy Code to prevent abusive practices by professionals. The congressional sponsor of the amendment to Section 330(a) described the need for the amendments as follows:

We learned that is not uncommon for (professionals) for engage in such tactics as overstaffing, superfluous conferencing, unnecessary research and duplication of work. Moreover, we learned that there is widespread disparity in the fees paid, in the standards and laws used to set them, and in the maneuvering lawyers use to get them....

....The legislation sets forth in clear and concise terms those factors that must be considered when decided the appropriateness of a fee request. Some of the factors to be considered are: First, whether the services were beneficial at the time they were rendered toward the completion of the case; second, whether the services are reasonable and necessary; third, the customary rates charged for services; and fourth, whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem addressed.

140 Cong. Rec. S14597 (Oct. 7, 1994)(statement of Sen. Metzenbaum).

Even prior to the 1994 amendments, services compensated pursuant to Section 330(a) were required to benefit the estate in the Eighth Circuit. *See In re Reed, Id.* To determine whether the number of hours required is reasonable, the actual time expended is not necessarily the reasonable time expended. *Smith v. Freeman*, 921 F.2d 1120, 1122 (10th Cir.1990).

The burden to show entitlement to fees is on the applicant. *In re Kroh Bros. Dev. Co.*, 120 B.R. 997, 1001 (W.D.Mo. 1989); *In re Gary Fairbanks*, 111 B.R. 809, 811 (Bankr. N.D. Iowa 1990); *In re Grimes*, 115 B.R. 639, 642, 649-50 (Bankr. D. S.D. 1990). "This burden is not to be taken lightly, especially given that every dollar expended on legal fees results in a dollar less that is available for distribution to the creditors or use by the debtor." *In re Yankton College*, 101 B.R. 151, 158 (Bankr. D.S.D. 1989). *See also, In re Hanson Industries, Inc.*, 90 B.R. 405, 409 (Bankr. D. Minn. 1988); *In re Kroh Bros. Development Co.*, 120 B.R. 997, 1001 (W.D.Mo. 1989); *In re Gary Fairbanks*, 111 B.R. 809, 811 (Bankr. N.D. Iowa 1990); *In re Grimes*, 115 B.R. 639, 642, 649-50 (Bankr. D. S.D. 1990).

The United States Trustee does not bear the burden of showing that the Applicant is not entitled to the compensation requested. Applicant bears the burden of proving that it is so entitled. In the present case, the Applicant is unable to show that the fees sought provided value to the estate and furthered the debtor's reorganization efforts to the extent of the amount sought. Without a showing that the fees incurred were reasonable, provided value to the estate and furthered the debtor's reorganization efforts, the application must be denied.

Section 330(a) should be read narrowly by the bankruptcy courts, as stated by one bankruptcy court in Minnesota noted: "It is well settled that these statutory provisions must be narrowly construed, in order to keep fees and administrative expenses at a minimum so as to preserve the estate for the

benefit of all creditors." *In re Hanson Industries*, 90 B.R. at 409 (citing *In re O.P.M. Leasing Services, Inc.*, 23 B.R. 104, 121 (Bankr. S.D. N.Y. 1982)).

Billable hours are not necessarily compensable hours: "An increasing attitude in the bankruptcy community is that if the time is actually expended, the applicant is entitled to receive all fees requested. All professionals must be disabused of this fallacious notion." *In re Chas. A. Stevens & Co.*, 105 B.R. 866, 871 (Bankr. .N.D. Ill. 1989); see also, *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). *See also In re Golden Recipe Chicken, Inc.*, 109 B.R. 692 (Bankr. W.D. Pa. 1990).

In Hansen, Jones & Leta, P.C. v. Segal, 220 B.R. 434 (D. Utah 1998), the District Court sustained on appeal the bankruptcy courts denial of all fees sought by a law firm representing a debtor in possession prior to the appointment of a chapter 11 trustee. The case involved a law firm which did not have a conflict of interest at the inception of the case, but nevertheless, took actions which benefitted insiders at the expense of various constituencies of creditors. By taking actions which were contradictory to the debtor in possession's duties, the court determined, through circumstantial evidence, that all fees and expenses sought by counsel for representing the debtor in possession should be denied.

In the present case, although the U.S. Trustee's motion for the appointment of a chapter 11 trustee was settled, the court should still look to the circumstantial evidence and determine that all fees and expenses sought by Applicant should be denied. Such circumstantial evidence includes MCI's pre petition business relationship with Mr. Garamella, the numerous phone conferences between MCI personnel and Mr. McDonald without the presence of debtor's counsel, etc.

Duplication of Services

The 1994 amendments to Section 330(a) specifically note that the bankruptcy court should not

approve duplication of services. Even before the amendments, case law routinely disallowed requests for fees for duplicative services. *In re Office Products of America, Inc.*, 136 B.R. 964, 976-77 (Bankr. W.D. Tex. 1992) (duplication from interoffice conferences); *In re Heck's, Inc.*, 112 B.R. 775, 792 (partner duplicated associate's work); *In re Stoecker*, 128 B.R. 205, 212 (Bankr. N.D. Ill. 1991) (duplication from several attorneys attending court hearings or meetings); *In re Bernard Hill, Inc.*, 133 B.R. 61, 70 (Bankr. D. Md. 1991) (duplication where debtor hired two firms and each firm performed services in the other's expertise). Anytime more than one professional is billing for the same task, the burden is on the applicant to show that the circumstances justify such billing.

In this case, the Application contains billings by at least three individuals attendance at court hearings. Other meetings were often attended by two or more MCI members, all of whom were not necessary to the task. On any particular component of the case, at most only one senior person and one junior person should be necessary and at any given time, and only one or two professionals should be providing a particular service, not three or more, as in this application.

Billing in One-Half Hour Increments

Billing in one-half hour increments is simply not permitted since it has the effect of inflating the actual charges to the estate. In *Re Stoecker*, 114 BR 965 (N.D. Ill. 1990), the court addressed billing in quarter hour increments and found that since Fed. R. Bankr. P. 2016 requires actual time expended to be detailed, such a billing practice is unacceptable. See also, *Pettibone*, 74 B.R. 293, 302 (N.D. Ill. 1987); *Wildman*, 72 B.R. 700, 708-709 (N.D. Ill 1987). Billing in quarter hour increments (or larger) has the likelihood of inflating the charges to the estate, especially when telephone calls are being recorded. In *Stoecker*, Judge Schmetterer, in citing *In re Sapolin Paints, Inc.*, 38 B.R. 807, 814

(Bankr.E.D.N.Y.1984), held that very short phone calls are routinely recorded as taking 12 or 15 minutes at rates ranging from \$110.00 to \$150.00 per hour and the attorney makes a number of calls, the distortion in the hours claimed and the cost to the estate are substantial." *Id.* at 709. In the present case, there should be a substantial reduction in fees allowed for the Applicant's practice of billing in one half hour increments.

Conclusion

The United States Trustee requests that the Bankruptcy Court sustain the objections to the Application for allowance of fees and expenses by the Applicant. Applicant has not demonstrated that fees sought are allowable. The United States Trustee's objections to the Application should be sustained unless the Applicant can show that it is entitled to said fee.

Based on the foregoing, the fees and expenses sought should not be allowed, as set forth in the United States Trustee's objection.

Dated: September 29, 2004

HABBO G. FOKKENA
United States Trustee
Region 12

s/Michael R. Fadlovich
Michael R. Fadlovich, Atty # 158410
Trial Attorney
U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415
TELE: (612) 664-5500
FAX: (612) 664-5516

CERTIFICATE OF SERVICE

In Re:)	
)	
Intrepid USA Inc)	Bankruptcy No. 04-40416
and Jointly Administered Cases)	04-40462
)	04-40418
)	Case Nos.04-41924-04-41988
Debtor(s).)	
)	Chapter 11 Case

I, Terri L. Frazer, declare under penalty of perjury that on September 29, 2004, I served a copy of the following United States Trustee's Objection to the Application of Manchester Companies, Inc. for Allowance of Fees by mail, postage prepaid, to each person named below:

DENNIS SIMON
INTREPID USA INC
6600 FRANCE AVE S STE 510
EDINA MN 55425

CAPITALSOURCE FINANCE LLC
PO BOX 626
PLANETARIUM STATION
NEW YORK, NY 10024-0540

FAYE KNOWLES
FREDRIKSON & BRYRON
200 S 6TH ST STE 4000
MINNEAPOLIS MN 554502
FAX: 612-492-7077

CAPITAL SOURCE FINANCE LLC
C/O KENNETH J. OTTAVIANO, ESQ
KATTEN, MUCHIN, ZAVIS, ROSEMAN
525 WEST MONROE STREET #1600
CHICAGO, IL 60661

MICHAEL P MASSAD
HUNTON & WILLIAMS LLP
30TH FLOOR, ENERGY PLAZA
1601 BRYAN ST
DALLAS TX 75201
FAX: 214-979-3013

DVI FINANCIAL SERVICES INC
C/O CLARK T WHITMORE
90 S 7TH ST STE 3300
MPLS MN 55402
FAX: 612-672-8397

DVI BUSINESS CREDIT CORP
C/O RICHARD M BECK
260 S BROAD ST
PHILADELPHIA PA 19102-3163
FAX: 320-426-9193
FAX: 215-568-6603

SECURITIES & EXCHANGE COMMISSION
175 WEST JACKSON BLVD, SUITE 900
CHICAGO, IL 60604

D. GERALD WILHELM
ROYLENE CHAMPEAUX
US ATTORNEY
600 US COURTHOUSE
300 SOUTH FOURTH STREET
MINNEAPOLIS MN 55415

TODD J GARAMELLA
C/O JOHN MCDONALD
2800 LASALLE PLAZA
800 LASALLE AVE
MINNEAPOLIS MN 55402
FAX: 612-339-4181

MN DEPT OF REVENUE
COLLECTION ENFORCEMENT
551 BANKRUPTCY SECTION
PO BOX 64447
ST PAUL MN 55164

INTERNAL REVENUE SERVICE
SPECIAL PROCEDURES BRANCH
316 N ROBERT ST STOP 5700
ST PAUL MN 55101

JEFFREY GARFINKLE
BUCHALTER NEMER
18400 VON KARMAN AVE, SUITE 8001
IRIVNE, CA 92612-9766

IRS DISTRICT COUNSEL
650 GALTIER PLAZA
175 E 5TH ST
ST PAUL MN 55101

WENDY TIEN
US DEPT OF JUSTICE
CIVIL DIVISION
PO BOX 875
BEN FRANKLIN STATION
WASHINGTON, DC 20044-0875
FAX: 202-514-9163

GREG BONGIOVANNI
OFFICE OF GENERAL COUNSEL
US DEPT OF HEALTH & HUMAN SERV
SUITE 5M60 AFC
61 FORSYTH ST., SW
ATLANTA, GA 30303-8909
FAX: 404-562-7855

GEORGE SINGER
JAMES LODOEN
LINDQUIST & VENNUM
4200 IDS CENTER
80 S 8TH STREET
MINNEAPOLIS, MN 55402

MICHAEL STEWART
ABBY WILKINSON
FAEGRE & BENSON
2200 WELLS FARGO CENTER
90 SOUTH SEVENTH STREET
MINNEAPOLIS MN 55402-3901

MARK W. SHEFFERT, CEO
MANCHESTER COMPANIES, INC.
4700 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MN 55402

Dated: 9-29-04

By: 

Office of the United States Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 11

Intrepid, U.S.A., Inc.,
and Jointly Administered Cases,
Debtors.

Case # 04-40416-NCD
Case # 04-40462-NCD
Case # 04-40418-NCD
Cases 04-41924 through 04-41988-NCD

ORDER

In Minneapolis, Minnesota, the _____ day of _____, 2004.

The Application for Interim Allowance of Fees and Expenses by Manchester Companies, Inc., as advisors to the debtors in the above entitled cases came before the undersigned United States Bankruptcy Court. Michael R. Fadlovich appeared for the United States Trustee. Other appearances were as noted in the record.

Based on the pleadings, the arguments of counsel, all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

That the application for allowance of fees and expenses by Manchester Companies, Inc., is denied.

The Honorable Nancy C. Dreher
United States Bankruptcy Court